In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-1367

HYSTER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Hyster Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 3, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. The supplemental decision and order of the National Labor Relations Board, reported at 220 N.L.R.B. 1230 (1975), appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 3, 1977. A timely petition for rehearing was denied on March 3, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a discharged employee who does not seek interim employment consistent with his skills for over three years, and who instead engages in low paying self-employment unrelated to his background, acts reasonably to mitigate his loss as required by § 10(c) of the National Labor Relations Act.

STATUTORY PROVISION INVOLVED

This case involves Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). That section is appended hereto as Appendix C.

STATEMENT OF THE CASE

Arthur Wolfe was discharged by Hyster Company from his employment at Hyster's plant in Danville, Illinois on October 15, 1970. The National Labor Relations Board subsequently found that the discharge was in violation of the National Labor Relations Act, and Mr. Wolfe was reinstated by Hyster on April 18,

1974. Thereafter, the Board brought this supplemental proceeding seeking backpay for Mr. Wolfe for the period from October 15, 1970 to April 18, 1974. The Board ordered that Hyster Company pay Mr. Wolfe $26,681.93 plus interest in backpay covering the entire three and one-half year period, and the Board's order was enforced by the Court of Appeals.

The record shows that Mr. Wolfe is a highly skilled individual. Prior to his discharge, Mr. Wolfe had worked in the areas of line assembly, repairs and inspection (Tr. 34),[1] and he testified that these positions required a mechanical background and mechanical ability (Tr. 35). In order to develop those skills, Mr. Wolfe took advantage of classes offered by Hyster Company in such subjects as geometric dimensioning and tolerance, automatic transmissions, and hydraulics (Tr. 36).

Mr. Wolfe testified that he contacted several local employers shortly after his discharge (Tr. 21-23). Also, until March 7, 1971, he reported on a weekly basis to the unemployment office in Danville (Tr. 20-21). In February or March, 1971, he was almost successful in gaining employment as a maintenance mechanic at Illinois Power Co., but another person was ultimately hired for the job (Tr. 23-24). That was Mr. Wolfe's last attempt to find a suitable job—he never again made any effort to find interim employment consistent with his background (Tr. 27, 44, 57).

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[1] "Tr." references are to the stenographic transcript of proceedings before the Administrative Law Judge.

Instead, he took his unemployment compensation check, purchased $500.00 worth of used tools, and started a home improvement enterprise, commencing April 1, 1971 (Tr. 24-25, 41).

Mr. Wolfe's qualifications to engage in this venture in self-employment were minimal, consisting only of "painting, roofing and laying blocks" for a contractor some 12 or 13 years before, and work on his parents' home (Tr. 25). The financial rewards were also minimal: In 9 months of 1971, the net profit was $3,124.00 (G.C. Ex. 3);[2] in all of 1972, the net profit was $4,844.00 (G.C. Ex. 4); and in all of 1973 the net profit was $4,346.00 (G.C. Ex. 5). Wolfe's average net income over the entire period was between $4,000 and $4,500 per year, roughly one-third of his former earnings. Mr. Wolfe himself acknowledged the fiscal futility of his venture:

> "Well, actually, if a good job offer had come along, I suppose I would have taken it, the way things were going." (Tr. 26).

Despite this recognition, Mr. Wolfe did not look for suitable work. He was discharged in October of 1970. For the next five and one-half months (i.e., until April 1, 1971), he testified that he made some attempts to find suitable employment (Tr. 23-24). He also testified that during that period of time he made weekly visits to the unemployment office (Tr. 20). While these efforts do not appear to have been par-

[2] "G.C. Ex." references are to exhibits of the General Counsel introduced at the proceeding before the Administrative Law Judge.

ticularly diligent or extensive, Petitioner feels that there is evidence in the record as a whole that they were reasonable, and Petitioner therefore has raised no issue as to that period of time.

However, commencing April 1, 1971, and continuing for the next *three years* until his reinstatement with Hyster Company, Mr. Wolfe made absolutely no effort to find suitable employment commensurate with his background and skills (Tr. 44, 57). During that three-year period, Mr. Wolfe never reported to the unemployment office, and he never contacted any employers to inquire about job opportunities, despite the fact that suitable work was available in the Danville area (Tr. 84). Mr. Wolfe's lack of diligence in seeking other work is demonstrated by the following transcript excerpt:

"Q. (by Mr. Shostrom): What about your efforts as far as finding better employment after you started your business?
A. Well, actually, if a good job offer had come along, I suppose I would have taken it, the way things were going.
Q. Did you go around and look for work as diligently as you did before?
A. No.
Q. (Judge Saunders): I take it from that answer, Mr. Wolfe, that you did not actually look for work after you began your own business, but if a good opportunity had come along then you would have taken it?
A. (The Witness): Yes. *I would have considered it anyway.*" (Tr. 26-27) (emphasis added).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other courts of appeals as to the proper interpretation of § 10(c) of the National Labor Relations Act.

In *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this Court held that § 10(c) of the National Labor Relations Act requires an employee who asserts that he was wrongfully discharged to mitigate his damages by seeking other employment. To the extent that the employee fails to fulfill that obligation, the employer is relieved of backpay liability.

Since 1941, this Court has not had occasion to address the issue of the mitigation doctrine in the context of backpay proceedings. Perhaps because of the absence of guidance, opinions of the National Labor Relations Board and the Courts of Appeals go in many different directions. It is impossible to reconcile the diverse holdings.

The decisions of the National Labor Relations Board run the gamut from cases requiring both substantial diligence and reasonable conduct to cases requiring neither. In *Saginaw Aggregates, Inc.*, 198 N.L.R.B. 598 (1972) the Board articulated the standard as follows:

> ". . . the test is whether, on the record as a whole, the employee has diligently sought other employment *during the entire backpay period.*" *Saginaw Aggregates, Inc.*, 198 N.L.R.B. No. 78 (1972) (emphasis added).

In *Knickerbocker Plastic Co.*, 132 N.L.R.B. 1209, 1219 (1961), the Board stated:

> "We do not . . . [believe] that it must appear that [the discriminatee] could have procured such a job [i.e., suitable interim employment] before he can be found to have incurred a willful loss by the failure to apply for it. It is incumbent on a claimant to seek a job for which he has extensive experience."

And in *McCann Steel Co., Inc.*, 203 N.L.R.B. 749 (1973), the Board found the extent of the employee's experience to be significant in determining whether his conduct in starting his own business was in good faith.

In this case, the Board turned its back on these standards. Rather than assessing Mr. Wolfe's conduct for the entire back-pay period, the Board found that Mr. Wolfe's search for employment during the first few weeks following his discharge relieved him of any requirement to search for suitable work thereafter. And rather than requiring that he seek a job in his field of expertise, the Board condoned Mr. Wolfe's abandonment of the area of his training in favor of a pastime for which he was neither trained nor qualified.

It would be possible to attribute the decision in this case to a recent philosophical weakening of the mitigation doctrine, were it not for cases like *Carter Lumber, Inc.*, 227 N.L.R.B. No. 117 (January 6, 1977). In that case, the employee had never worked less than 40 hours per week while employed by the respondent. During the backpay period, the employee worked less than 40 hours per week for interim employers, and the Board held that this fact alone constituted cause

for reducing the backpay amount due. The Board stated that to hold otherwise "would require Respondent now to indemnify [the employee] for his lack of diligence during his interim employment, a result we find inequitable."

The standards articulated by the Courts of Appeals are, if anything, even more in disarray than those of the Board. The Seventh Circuit holds that an employee must make a reasonable search for interim employment substantially equivalent to his prior position. *NLRB* v. *Nickey Chevrolet Sales, Inc.*, 493 F.2d 103 (7th Cir. 1974). The Fifth Circuit has taken the position that an employee must at least make "reasonable efforts to find new employment which is substantially equivalent to the position from which he was discharged and is suitable to a person of his background and experience." *NLRB* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966). And the District of Columbia Circuit has held recently as follows:

> "The question here is whether the losses were willfully incurred. This question in turn depends on whether public policy is best served by encouraging a skilled and healthy worker to remain idly unemployed for 18 months, or by encouraging him to obtain a job, comparable to his regular job in working conditions and wages, for the duration of the strike period. The Supreme Court has indicated that such policy questions should be resolved in favor of the 'healthy policy of promoting production and employment.' [citing *Phelps Dodge Corp.* v. *NLRB, supra*]." *NLRB* v. *Madison Courier, Inc.*, 505 F.2d 391, 397 (D.C. Cir. 1974).

On the opposite end of the spectrum is the Ninth Circuit's holding in this case that once Mr. Wolfe had launched his home repairs venture, he was completely justified in not interviewing with prospective employers and in not even maintaining his registration with the state employment office.

It is impossible to reconcile these disparate holdings into a rational and consistent body of law. The result of this confusion is that neither the National Labor Relations Board, employers, nor employees have the guidance necessary to permit them to assess their respective rights and obligations under the mitigation doctrine.

These conflicts justify the grant of certiorari to review the judgment below.

2. The decision below raises significant and recurring problems concerning the proper construction of the mitigation doctrine.

The Ninth Circuit's opinion in this case involves important policy considerations which are central to the role of the National Labor Relations Board in backpay cases. Without disclosing why it does so, the Ninth Circuit sanctions an employee's failure, for over three years, to make any effort to find employment in his own field or employment which would be reasonably remunerative. This marked departure from the holdings of other courts, coupled with the fact that this Court has not had occasion to address itself to these matters since 1941, present compelling reasons why some definitive guidelines in the application of

the mitigation doctrine should now be marked by this Court.

Perhaps inadvertently, the Ninth Circuit has established, at the urging of the National Labor Relations Board, several principles from which it will be difficult to retreat. Among the principles established by this unprecedented opinion are:

(1) A claimant seeking backpay need no longer seek suitable employment throughout the backpay period — apparently he need only make some efforts at the outset, and he will thereafter be insulated from challenges to his subsequent behavior. This is contrary to previously uniform authority that the claimant's conduct throughout the entire backpay period must be assessed. See, for example, *NLRB* v. *Madison Courier, Inc.*, 505 F.2d 391 (D.C. Cir. 1974) where the backpay period was 18 months, and the court subjected the claimants' activities throughout the period to careful scrutiny.

(2) The claimant's qualifications for the work which he undertakes are apparently no longer relevant. This is a major departure from established law. See, e.g., *Heinrich Motors Inc.* v. *NLRB*, 403 F.2d 145 (2nd Cir. 1968). It is not unlikely that many people, if given the option, would prefer to take a three year vacation doing what they like to do and pursuing various hobbies, secure in

the knowledge that their sabbatical will be paid for by their previous employer. However, that would appear to be inconsistent with the "healthy policy of promoting production and employment" articulated by this Court in *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941). Perhaps the Ninth Circuit would impose limitations upon this principle, but none appear in its opinion. The decision in this case would seem to approve the action, for instance, of a skilled industrial worker with minimal talent for playing the violin spending three years standing on a street corner improving his musical abilities and contenting himself with earning whatever came his way.

(3) If a claimant testifies that he is working full time, regardless of the nature of the work, he is apparently thereby relieved of any duty to seek suitable employment. The law has been clear, until now, that a claimant must seek suitable employment in an effort to mitigate his losses. If the claimant is found to be *reasonably* mitigating his losses, he is permitted to devote his attention to his work and not jeopardize it by job hunting. *Heinrich Motors, Inc.* v. *NLRB, supra; East Texas Steel Castings, Inc.*, 116 N.L.R.B. 1336 (1956). However, in its opinion in this case, the Ninth Circuit seems to have eliminated the requirement of reasonableness and to re-

quire only that the claimant be doing something, no matter how inappropriate, in order to avoid the duty to seek suitable work.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HYSTER COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-3757

MEMORANDUM

On Petition to Review an Order of the National Labor Relations Board.

Before: BROWNING and CHOY, Circuit Judges, and WILLIAMS,* District Judge.

Hyster Company petitions under § 10(f) of the National Labor Relations Act (29 U.S.C. § 160(f)) for review of an order directing appellant to pay $26,681.93 back wages to one Wolfe, found to have been unjustly discharged by Hyster. The National Labor Relations Board (N.L.R.B.) has counter-petitioned for enforcement of its order. This panel has on its own motion determined that oral argument would not be helpful and the matter was submitted on the briefs.

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* The Honorable David W. Williams, United States District Judge for the Central District of California, sitting by designation.

The employer contends that Wolfe did not act reasonably to mitigate his wage losses prior to being reinstated. It is undisputed that for the 5½ months following his termination, Wolfe made satisfactory efforts to find new employment within the area of his skills, but, finding none, abandoned those efforts and became self-employed doing small construction jobs. Although he devoted approximately 60 hours a week to this work, it brought him income of only about $4,000.00 per year, a sizeable reduction from his earnings with Hyster.

The N.L.R.B. is given broad remedial powers in matters of this type, subject only to limited judicial review. *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953). When backpay is ordered, a wrongfully discharged employee is generally entitled to the difference between what he would have earned but for the wrongful termination and his actual earnings between the time of discharge and reinstatement. *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 197-200 (1941). It may be reduced if the discharged employee incurs a "willful loss of earnings." *Oil, Chemical and Atomic Workers Int. Union* v. *N.L.R.B.*, — F.2d — (No. 75-1065, D.C. Cir., June 28, 1976). The burden of proving such willful loss is on the employer. *N.L.R.B.* v. *Madison Courier, Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972). The discharged employee is merely required to make "reasonable efforts" to mitigate his loss of earnings. *N.L.R.B.* v. *Arduini Mfg. Corp.*, 394 F.2d 420, 423 (1st Cir. 1968). Self-employment is recognized by the courts as a proper method

of mitigation. *Heinrich Motors, Inc.* v. *N.L.R.B.*, 403 F.2d 145, 148 (2d Cir., 1968); *N.L.R.B.* v. *Mastro Plastics Corp.*, 354 F.2d 170, 179 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).

As the discharged employee was honestly engaged in full-time self-employment throughout the period in question the court holds that he satisfied his obligation to mitigate his wage loss.

The order of the N.L.R.B. directing Hyster Company to pay the discriminatee backpay in the amount of $26,681.93 plus interest shall be enforced.

APPENDIX B

Hyster Company *and* Arthur J. Wolfe. Case 38-CA-1033

October 10, 1975

SUPPLEMENTAL DECISION AND ORDER
BY CHAIRMAN MURPHY AND MEMBERS FANNING AND PENELLO

On June 30, 1975, Administrative Law Judge Phil Saunders issued the attached Supplemental Decision in this proceeding.[1] Thereafter, Respondent filed exceptions and a supporting brief, and General Counsel filed an answering brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Hyster Company, Urbana, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] The Board's original decision appears at 195 NLRB 84 (1972).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PHIL SAUNDERS, Administrative Judge: This supplemental proceeding is to determine the amount of backpay due in accordance with the Board's Decision and Order, 195 NLRB 84 (1972), directing Hyster Company, herein called Respondent or the Company, to make whole Arthur J. Wolfe for his losses resulting from the Respondent's unfair labor practice.[1] On April 15, 1975, the parties appeared and participated before me with full opportunity to present evidence and argument on the issues. Subsequent to the close of the hearing, briefs were received from the Company and the General Counsel.

On the entire record herein and on the basis of my

[1] On March 20, 1973, the United States Court of Appeals for the Seventh Circuit entered an order denying the cross-petition for review and granting enforcement of the Board's Order. The court entered its judgment on September 14, 1973. On October 25, 1973, the court denied the Respondent's petition for a rehearing in the matter. On January 24 and February 6, 1974, the United States Supreme Court denied the Respondent's applications for an extension of time for filing a petition for certiorari.

observation of the witnesses, I make the following findings and conclusions:

Wolfe's illegal discharge took place on October 15, 1970, and he was reinstated by the Respondent on April 18, 1974, and the interval between these dates is the backpay period involved herein.[2] This record shows that Wolfe reported to the Illinois State Unemployment Office in Danville, Illinois, during the first week after his discharge, and thereafter reported to the Unemployment Office on a weekly basis until the latter part of March 1971. During the period from October 1970 to March 1971, Wolfe also made several visits to different employers in the Danville area in his efforts to gain employment. The main employers he contacted were General Motors, Bohn Aluminum, Tee-Pac Company, Illinois Bell, Continental Can, Illinois Power Company, Quaker Oats, and Esco Corporation. Wolfe

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[2] The net backpay specifications, as amended, are as follows:

Quarter	*Gross Backpay*	*Interim Earnings*	*Net Backpay*
4-70	$1901.88	0	$1901.88
1-71	2318.42	0	2318.42
2-71	2237.56	$1041.67	1195.89
3-71	2237.56	1041.67	1195.89
4-71	2595.83	1041.67	1554.16
1-72	2218.53	1144.75	1073.78
2-72	2409.68	1144.75	1264.93
3-72	2415.68	1144.75	1270.93
4-72	3466.34	1144.75	2321.59
1-73	3195.57	1086.50	2109.07
2-73	3230.36	1086.50	2143.86
3-73	3299.14	1086.50	2212.64
4-73	3785.30	1086.50	2698.80
1-74	3018.64	258.00	2760.64
2-74	707.52	48.07	659.45
		Total net backpay	$26,681.93

stated that he personally visited some of these employers three or four times in an attempt to secure employment, and he also made a number of telephonic inquiries to these employers. He said that only in one instance did he receive an encouraging response to his efforts, and that was in February or early March 1971, when he was interviewed by a personnel manager at Illinois Power Company's Danville office. Illinois Power was looking for a maintenance mechanic and during his interview Wolfe was told that he had all the qualifications and the background needed for the job. Wolfe stated that the personnel man was going to hire him immediately, but then he changed his mind and told him he would be contacted the following morning. However, Illinois Power did not call him and when Wolfe contacted the personnel manager he was informed that Illinois Power had hired another person for the job.

After these numerous unsuccessful efforts to obtain employment, Wolfe decided to start his own business and stated he made this decision because he could not obtain work any place in the Danville area and his unemployment compensation was exhausted. Wolfe also testified that he felt his discharge by the Company for his union activities made him undesirable as a job applicant in the Danville area, and as a result decided to go into business for himself.

In April 1971, Wolfe started to do business as a small independent contractor under the name of Wolfe's Home Improvement. This business involved general home repairs, remodeling, and small construc-

tion jobs. Wolfe said his decision to go into this kind of business was based upon his mechanical ability, his experience in the field as an employee of a contractor for a year and a half, and his own personal experience in doing remodeling and roofing work on his parent's home. Since April 1971, Wolfe has conducted his construction or remodeling business continuously to date, and has done so out of his residence or home located in Catlin, Illinois. Moreover, it is clear from this record that Wolfe was occupied on a full-time basis with his business, and devoted approximately 60 hours or more a week to it. From time to time he also hired one or two employees to assist him and advertised in the community in an effort to gain more work. During the backpay period, Wolfe's gross receipts increased substantially, and, admittedly, he ceased his strenuous efforts to obtain other employment, but said that if a good job had been offered he would have taken it, but after starting in his own business he was not going around looking for work "as diligently" as he did before.

This record shows that during the early backpay period relevant hereto, Wolfe received $300 through the Community Action Program Council of the United Auto Workers. Both Wolfe and R. L. Kelley, the subregional director for the UAW in the Danville area, testified before me that various locals took up collections and that these donations were then funneled through the Community Action Program Council which, in turn, sent the checks to Wolfe. It appears from this record that Wolfe was very much interested in having the UAW represent the employees in the

Respondent's Danville plant where he was employed, rather than the incumbent union, and before his discharge had circulated a petition, among other efforts, in his desire to accomplish this objective. R. L. Kelley stated, "These donations were made on behalf of Art Wolfe because we [UAW] felt that the Company had discharged Art unjustly for union activity." Kelley further stated that Wolfe had never worked for the UAW in any capacity, and his efforts at the Danville plant on behalf of the UAW was strictly his own doing. These donations were never repaid nor did the UAW ever expect repayments.[3]

The Respondent points out that prior to his discharge Wolfe had worked in line assembly and repairs and had an inspection job at the plant, and in doing so Wolfe demonstrated good mechanical ability. The Respondent argues that Wolfe then "literally abandoned" the skills, knowledge, and mechanical ability which 7 years at Respondent's plant had taught him when he elected to go into business for himself, that his contracting venture was not a satisfactory application of his special talents, and, therefore, Wolfe was not exercising a good-faith effort to mitigate his damages. Relying on the criteria set forth in *East Texas Steel Castings Company, Inc.*, 116 NLRB 1336 (1956), Respondent points out that Wolfe's endeavor

[3] In addition to the above, there was $274 paid by the UAW to Wolfe as a result of his suspension in July 1970, but the General Counsel is not seeking backpay for the 8-day period, which also predates the backpay period involved herein. Wolfe also received approximately $150 as a direct donation from Hyster employees.

in his contracting business did not assure him of either steady work nor regular income, and that Wolfe had no real basis for his conviction that he could not find work for which he was qualified,[4] and further maintains that there was no risk to Wolfe in continuing his search for appropriate employment, and when he ceased to do so on and after April 1, 1971, the Respondent's backpay liability terminated as of that date.

The Respondent further maintains that the backpay due Wolfe for the period through March 30, 1971, should be reduced by the payments he received from the UAW because Wolfe had been working on behalf of the UAW at the Hyster plant, and the payments he received were compensation for services rendered and, as such, they are a proper credit in the backpay computation.

Final Conclusions

The duty of an employee to mitigate his damages by seeking other employment has been duly established and recognized for many years. As the Board recently put it,

> . . . the test is whether, on the record as a whole, the employee has diligently sought other employment during the entire backpay period. [*Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972).]

[4] Respondent's Danville plant manager, Paul Herren, testified that by late 1972 it had become "very hard" to hire qualified employees both for the Respondent and for other employers engaging in similar operations.

This record reveals that almost immediately after his unlawful discharge, Wolfe reported weekly to the Illinois State Unemployment Office until late March 1971, and during these same months made repeated visitations and calls to at least eight different prospective employers, as aforestated. Moreover, this was in a period where admittedly the type of technical work that Wolfe had been previously trained in by the Company was extremely difficult to find, even the Respondent had cutbacks on all the overtime work at its Danville plant. There were also special circumstances whereby Wolfe was denied employment at the Illinois Power Company. As far as I am able to determine there have been no specific guidelines or criteria established on the actual number of employers a discriminatee must contact or the frequency of his calls, in order to satisfy the test of due diligence in seeking other employment, but it appears to me that under the normal standards set forth by the Board Wolfe satisfied the essential requirements.[5] It is also noted that in one phase of the Respondent's brief it

[5] The principle that a wrongfully discharged employee mitigates his losses by seeking employment elsewhere does not require that his search meet with "success, it only requires an honest good-faith effort." *N.L.R.B.* v. *Cashman Auto Company*, 233 F.2d 832 (C.A. 1, 1955). To set a definite standard depends upon the facts and circumstances in each case, but in general terms it can be said that a good-faith effort requires conduct consistent with inclination to work and to be self-supporting, and such inclination is best evidenced not by a purely mechanical examination of the number or kinds of applications, but rather by the sincerity and reasonableness of all the efforts made. Circumstances include the economic climate, his skill and qualifications, his age, and his personal limitations. *Mastro Plastics Corporation*, 136 NLRB 1342 at 1359 (1962).

claims that its backpay liability ceased as of April 1, 1971, when Wolfe established his own business, and by inference from this contention it might be argued that by setting forth this specific date the Respondent is actually conceding and admitting a diligent or reasonable search for employment up to at least this point of time in the backpay period.

The Respondent contends that by going into business for himself, Wolfe took himself out of the labor market, and for that period he was not entitled to backpay. I reject this contention. The Board has consistently held that a claimant who goes into business for himself is treated as one who obtains interim employment. *McCann Steel Company, Inc.*, 203 NLRB 749 (1973). As detailed previously herein, Wolfe initially made a rather extensive search for work, but these efforts proved to no avail and, as pointed out, he had one incident with Illinois Power Company which led him to believe that, even if jobs were available in the Danville area, his involvement in union activity greatly diminished his chances of gaining employment. I agree that under these circumstances the Respondent can hardly argue that Wolfe "removed" himself from the job market. In his brief the General Counsel states, in pertinent part:

> The evidence makes it apparent that Wolfe had to choose between only two alternatives, long and continued unemployment or going into business for himself. It is to Wolfe's credit that he chose self-employment. Indeed, the Respondent should be appreciative of Wolfe's course of action in that it surely diminished Respondent's backpay liability.

In the overall considerations of this case, it is also significant that Wolfe had at least some qualifications and experience in the small construction business, and that he devoted his full energies and time to his business. He also made a sizeable investment in his operations through the purchase of tools and other equipment, and hired employees to assist him. As pointed out, it is also noteworthy that his gross receipts increased considerably each year during the backpay period. In fact, in 1973 his gross income was over $40,000.[6] As further maintained by the General Counsel, and I agree, there is no probative evidence in the record to show that any outside employment opportunities were available to Wolfe at any time during the backpay period. Indeed, Wolfe testified that if a better job had been available he would have taken it, and the sincerity of this testimony is demonstrated by the fact that Wolfe accepted Respondent's offer of reinstatement when it finally came.

Turning to Respondent's argument that money received by Wolfe from the UAW were payments for services rendered, this record clearly established that the amounts received by Wolfe during the early backpay period, as aforestated, were voluntary contributions from individual UAW members who took up collections at local union meetings, and from his fellow employees at the Company who established an "Art

[6] See G.C. Exhs. 2, 3, 4, 5, and 6.

Wolfe Fund" through their contributions. I agree that the gratuitous nature of these contributions cannot be construed to be payments made to Wolfe for services performed for UAW members or fellow company employees inasmuch as the record is barren of any substantiating evidence for such a finding. As further pointed out, there is nothing in this record which controverts the testimony of Velley to the effect that it was the members' conributions or donations that were merely funneled through the Community Action Program of the UAW to Wolfe. There is no probative evidence in this record that Wolfe was employed by the UAW in any capacity, nor were any funds solicited, as such, by the Community Action Program on Wolfe's behalf. Finally, as further pointed out by the General Counsel, there was no evidence presented showing that Wolfe continued any of his organizational activities for the UAW or anyone else after his termination by the Respondent.

The original specificaitons in this case computed overtime payments for Wolfe from the very start of his backpay period, but at the hearing before me several of the Respondent's witnesses testified that there was an extended period of time during which there was no overtime of any kind at the Respondent's Danville plant. Based on the examination of certain company records, the parties subsequently agreed that there was no overtime from October 18, 1970, until on or about November 1, 1972, and the amended backpay specification by the General Counsel, as set forth earlier herein, so reflects this agreement and the back-

pay liability of the Respondent is reduced in accordance therewith.

I conclude and find that Arthur Wolfe is due backpay from the Respondent in the amount of $26,681.93, plus interest at the rate of 6 percent per annum, computed in the manner set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), until the date of payment of all backpay.[7] Payment of this sum shall be less any taxes required to be withheld by Respondent under Federal, state, and local law.

[7] The General Counsel urges that because of "snowballing inflation" and "skyrocketing interest" the rate of interest charged to Respondent be raised to at least 8 percent. However, in *Mercy Peninsula Ambulance Service, Inc.*, 217 NLRB No. 141 (1975), this same argument was made and therein the Board stated: "While we are, of course, aware of the current inflation, we note that the rate of inflation has been fluctuating both up and down and that it differs according to geographic area. Accordingly, we remain of the view that the established uniform rate of 6-percent interest is the measure of recovery which best effectuates the purposes of the Act."

APPENDIX C

National Labor Relations Act § 10(c)
29 U.S.C. § 160(c)

Reduction of testimony to writing; findings and orders of Board

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay must be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in

scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

No. 76-1367

In the Supreme Court of the United States

OCTOBER TERM, 1976

HYSTER COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. A4-A14) are reported at 220 NLRB 1230.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1977, and a petition for rehearing was denied on March 3, 1977. The petition for a writ of certiorari was filed on April 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that an employee who had been discharged in violation of the National Labor Relations Act made reasonable efforts to mitigate his wage losses by becoming self-employed after he was unable to obtain other employment.

STATEMENT

Arthur J. Wolfe was unlawfully discharged by Hyster Company (the Company) in October 1970, and the Board ordered that he be reinstated with backpay.[1] He was reinstated in April 1974 (Pet. App. A6). However, when the parties were unable to agree on the amount of backpay due Wolfe from the date of his unlawful discharge to his reinstatement, a supplemental hearing was held. The record thereof disclosed the following facts:

From the week of his discharge through March 1971 Wolfe regularly reported to the state unemployment office and applied for work at eight or more local industrial employers, visiting and telephoning some several times (Pet. App. A6-A7). During this time Wolfe was rejected for an opening at a local utility company under circumstances that led him to believe that his prior union activity had been held against him (Pet. App. A7, A12). In April 1971, Wolfe ceased active job searching and established a small construction enterprise, specializing in home repair and remodeling (Pet. App. A7). Wolfe did so because he believed that his discharge for union activities had hindered his ability to obtain other work. He believed that he was qualified for construction work because of his mechanical ability and his experience in home remodeling gained as an

[1] *Hyster Co.*, 195 NLRB 84, enforced, C.A. 7, Nos. 72-1288 and 72-1403, decided March 20, 1973.

employee of a contractor and in repairing his parents' home (Pet. App. A7-A8).

Wolfe devoted approximately 60 hours per week to his repair business, made sizeable investments in tools and equipment, advertised for business, and hired employees to assist him (Pet. App. A8, A13). His gross receipts increased each year and exceeded $40,000 in 1973, although his profits were low (Pet. App. A13, A6 n. 2). Although Wolfe had ceased his active search for a job, he remained available for other employment, and he accepted the Company's offer of reinstatement in April 1974 (Pet. App. A6, A13).

The Board concluded that Wolfe acted reasonably to mitigate his wage losses prior to reinstatement by the Company, both in his initial search for work and his subsequent self-employment (Pet. App. A4, A12-A13). Accordingly, the Board awarded backpay to Wolfe in an amount equal to what he would have earned with the Company, reduced by his actual earnings (Pet. App. A15). The court of appeals enforced the Board's order (Pet. App. A1-A3).

ARGUMENT

A wrongfully discharged employee is generally entitled to backpay in an amount equal to what he would have earned but for his discharge, reduced by his actual earnings. *Phelps-Dodge Corp.* v. *National Labor Relations Board*, 313 U.S. 177, 197-200. Although the amount of backpay may be reduced if the employee neglects to mitigate his loss, the employee is required to make only "reasonable efforts" to secure other employment. *National Labor Relations Board* v. *Arduini Corp.*, 394 F. 2d 420, 423 (C.A. 1). He or she need not take unsuitable work simply to reduce the employer's liability for its unlawful conduct. See *Florence Printing Co.* v. *National Labor Relations Board*, 376 F. 2d 216, 220-221

(C.A. 4), certiorari denied, 389 U.S. 840. Furthermore, self-employment is "an adequate and proper way for the injured employee to attempt to mitigate his loss of wages," even when other job opportunities are available. *Heinrich Motors, Inc.* v. *National Labor Relations Board*, 403 F. 2d 145, 148-149 (C.A. 2). And see *National Labor Relations Board* v. *Mastro Plastics Corp.*, 354 F. 2d 170, 179 (C.A. 2), certiorari denied, 384 U.S. 972:

The question whether Wolfe failed to make reasonable efforts to mitigate the Company's backpay liability involves the application of these principles to the facts of this particular case.[2] Such an issue does not warrant review by the Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 480. In any event, the Board properly concluded that Wolfe's decision to become employed was reasonable. Wolfe resorted to self-employment only after attempts to obtain other employment had proved unsuccessful. He had skills and experience that qualified him for the construction business, and he devoted his full energies and time to that business, attaining a gross income exceeding $40,000 in 1973. The Company adduced no probative evidence that any other suitable employment opportunities were available to Wolfe during the backpay period (Pet. App. A12-A13). In these circumstances, Wolfe's self-employment diminished, rather than increased, the Company's backpay liability, and the Company is not entitled to any further reduction of the award.

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[2]There is no conflict among the circuits. The opinion of the court of appeals (Pet. App. A2-A3) cites approvingly several of the decisions upon which petitioner relies (Pet. 8, 10) and is consistent with other pertinent cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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